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No. 97-1549

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

WALTER FROST
PETITIONER

VS.

UNITED STATES OF AMERICA
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

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13 pp

QUESTIONS PRESENTED

1. WHETHER THE SIXTH CIRCUIT COURT OF APPEALS HAS VIOLATED THE APPELLANT'S FIFTH AND SIXTH AMENDMENT RIGHTS WHEN IT CONSTRUCTIVELY AMENDED A GRAND JURY INDICTMENT.

2. WHETHER THE SIXTH CIRCUIT COURT IN UPHOLDING THE "HONEST SERVICES" COUNTS, STRETCHES THE STANDARD TO THE POINT OF BEING UNCONSTITUTIONALLY VAGUE AND IN DIRECT CONFLICT WITH ITS OWN OPINION IN UNITED STATES V. GRAY, F.2D 1290 (SIXTH CIR. 1986), *REV 'D*, MCNALLY V UNITED STATES, 483 U.S. 350 (1987), AS WELL AS, WITH OPINION'S OF OTHER CIRCUIT COURTS.

3, WHETHER THE APPELLANT WAS ACCORDED HIS CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY WHEN THE APPELLATE COURT FAILED TO REMAND BACK TO THE DISTRICT COURT ALL COUNTS UNDER A GIVEN SCHEME FOR WHICH THE GOVERNMENT FAILED TO DISCLOSE *BRADY* MATERIAL IN A MANNER SIMILAR TO THAT WHICH CAUSED DISSENTION IN THE SIXTH CIRCUIT: UNITED STATES V. SCHLEDWITZ, 86 F.3D 73, 75 (6TH CIR.).

AUTHORITIES CITED

Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341, 347 (1936) (Justice Brandeis, concurring) 2

Darby, 37 F.3d at 1063 2

United States v. Daniels, 973 F.2d 272, 274 (4th Cir. 1992), cert. denied, 506 U.S.1086 (1993) 2

United States v. Floresca, 38 F.3d 706 (4th Cir. 1994) 2

United States v. Gray, F.2d 1290 (6th Cir. 1986), *Rev 'd* i

United States versus Loayza, (4th Cir. 1997) 1, 2, 3, 5

McNally v United States, 483 U.S. 350 (1987) i

United States v. Nance, 533 F.2d 699 (D.C. Cir. 1976) 2

United States v. Price, 857 F.2d 234, 236 (4th Cir. 1988) (citing Russell v. United States, 369 U.S. 749 (1962)) 2

United States v. Schledwitz, 86 F.3d 73, 75 (6th Cir.) ..... i, 10

REPLY STATEMENT

The Defendant Walter Frost submits the following reply to the government's response to his Petition for Writ of Certiorari.

Violation of the Appellant's Fifth and Sixth Amendment Rights by Constructive Amended of the Grand Jury Indictment.

The Government's brief (Brief for The United States in Opposition) erroneously reports the wording of the Scheme of the superseding indictment. The brief states:

> " the indictment broadly charged petitioners with scheming "to defraud and to obtain money and property * * * from the United States and various federal agencies." C.A. App. 92; see Pet. App. A at 3. The indictment further charged that as part of the scheme to defraud, petitioners "cause[d] the government to pay for their classes in graduate programs at UTSL" C.A. App. 94. "

The Superseding Indictment, however, clearly reads :

> " ... a scheme and artifice to defraud and to obtain money and property ... from the United States and various federal agencies ... to enable WALTER FROST and ROBERT EUGENE TURNER to obtain influence with government employees and to use that influence for the financial benefit of FWG."

There is no reference to tuition fees or to obtain money and property for the financial benefit of the students.

United States versus Loayza, 4th Cir. 1997 reports detailed research which clearly demonstrates that courts require the dismissal of an indictment if the unlawful scheme or plan is:

> "masked, if not concealed, by the conclusionary language of the indictment as framed." p. 987. The court stated on p. 989 that"for all the indictment shows, the grand jury may have had a concept of the scheme essentially different from that relied upon by the government before the trial jury."

A list of some citations from United States versus Loayza, 4th Cir. 1997 supporting the need for clear language in the indictment follows:

> "The decisions in this circuit and as well the decisions of other circuits are consistent with the teachings of Russell and Stirone, and have, with considerable uniformity, dismissed indictments which did not state the essential facts constituting the offense charged."
>
> ...
>
> "In order to be legally sufficient, "[a]n indictment must contain the elements of the offense charged, fairly inform a defendant of the charge, and enable the defendant to plead double jeopardy as a defense in a future prosecution for the same offense." United States v. Daniels, 973 F.2d 272, 274 (4th Cir. 1992), cert. denied, 506 U.S.1086 (1993). If the indictment does not contain every essential element of the offense, it is invalid; and, a bill of particulars cannot cure the defect. Darby, 37 F.3d at 1063; United States v. Price, 857 F.2d 234, 236 (4th Cir. 1988) (citing Russell v. United States, 369 U.S. 749 (1962)). In essence, then, the bill of indictment insures that a defendant does not face incarceration "except on presentment or indictment of a grand jury;" thus, if it is insufficient, a prosecutor cannot cure the defects. Darby, supra; United States v. Floresca, 38 F.3d 706 (4th Cir. 1994)."
>
> ...
>
> "In United States v. Nance, 533 F.2d 699 (D.C. Cir. 1976), the court required dismissal of an indictment which had charged the obtaining of something of value by false pretenses with intent to defraud in violation of D.C. Code § 22-1301(a). While the indictment stated the name of the victim, the date of the false representation and the amounts involved, it did not state what was the false representation, describing the same only as "the false representations" (italics in original). The reason the court required the dismissal of the indictment is that the United States Attorney would have a free hand to insert the vital part of the indictment without reference to the Grand Jury, p. 701. That same condition pertains here with respect to the unnamed investors and inadequately described checks."

United States versus Loayza, 4th Cir. 1997 concludes:

> "From the discussion set forth above, it follows that I would require the indictment to be dismissed without prejudice to reindict Loayza. I would not even find it necessary to decide the constitutional question but would require the dismissal because the indictment is in violation of Fed. R. Crim. P. 7(c)(1). Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341, 347 (1936) (Justice Brandeis, concurring). Even if the key parts

> of the indictment are concise in that they are terse, it is neither plain nor definite nor does it contain the essential facts constituting the offense charged as required by that rule.
>
> If somehow or other a dependence on Rule 7(c) were not in order, I would have no hesitation in holding the indictment invalid under the grand jury requirement of the Fifth Amendment because the indictment does not sufficiently identify the acts with which Loayza was charged and it follows that there is no way to tell from the indictment whether Loayza was convicted of the same acts for which he was indicted by the grand jury."

In the present case, it is obvious that the Grand Jury envisioned defrauding the government of millions of dollar in contract monies as alluded to by the prosecution throughout trial and as headlined by the local and national news media daily before and while the Grand Jury was in session. It is unlikely, on the other hand, that the Grand Jury would hand down a criminal indictment if the loss of property was only tuition fees. They would opting most likely for civil, academic or administrative action. This is particularly true when government regulations specifically prohibit reimbursing employees solely for the purpose of providing them with an opportunity to obtain an academic degree (NASA/MSFC Personnel Management, Manual MM 3000.1). The proof at trail was that the students did receive a learning experience and consequently met the requirements of their assigned training programs.

Dr. Frost strongly disagrees with the Government's brief in opposition which concludes that the 6th Circuit Court has not constructively amend the indictment. The indictment returned by the Grand Jury and presented to the Jury for consideration states nothing in the scheme to defraud the government of tuition fees nor to financial benefit the students. The defendant's Fifth Amendment right to be prosecuted only on the basis of the essential facts stated in a Grand Jury indictment are in jeopardy here and Dr. Frost requests the Supreme Court protect his constitutional rights and dismiss Counts 1, 8 and 15.

In exactly the same vein, by affirming counts 17-20 the 6th Circuit has again amended the indictment handed down by the Grand Jury. It is clear in the research reported by United States versus Loayza, 4th Cir. 1997 that

an indictment must clearly state the essential facts constituting the offense charged. The wording of Scheme 2 in the Superseding Indictment is as follows:

> " ... a scheme and artifice to defraud the University of Tennessee of its right to the honest services of its employees, WALTER FROST and ROBERT EUGENE TURNER, and to obtain money and property .... The object of this scheme was to misuse the positions of WALTER FROST and ROBERT EUGENE TURNER as professors at for the financial benefit of WALTER FROST and his business, FWG, and to enable WALTER FROST to enjoy an expensive lifestyle above that of a college professor."

Clearly the concept of an unissued degree is not in the minds of the Grand Jury when handing down this indictment. The object of the scheme is for financial benefits for Walter Frost and his business, FWG, and for him to enjoy an expensive lifestyle above that of a college professor. It would be inherently clear to a Grand Juror that Frost and Turner would not defraud UTSI simple to provide the students with unearned degrees. Thus the wording of Scheme 2, to any one of normal prudence, alleges fraudulently obtain money and property to enhance Frost's life style.

That this was the intent of the indictment is further supported by the prosecution theme throughout the trial. It repeatedly referred to charts of money and income, the fact that Frost drove a Lincoln Town car, his wife's jewelry, and other money related matters (Transcript). For the 6th Circuit to affirm Counts on the bases that the University was defrauded of property in the form of unissued degrees and for the Government's Brief for The United States in Opposition to affirm the 6th Circuit's conclusion, is inconsistent with common sense.

The 6th Circuit's concluded:

> " ... there is no evidence that he intended that the government would not receive in return a necessary service, performed adequately and for a fair price. Because the evidence showed that FWG, and therefore Frost and Turner, fairly and adequately performed a necessary contract not secured through any misrepresentations ... "

In view of this finding there is no fraudulent source of funds to better Frost's life style. The wording of the Scheme handed down by the Grand Jury, i.e. to financial benefit Frost and his company, masks any facts constituting an alleged offense of defrauding UTSI of property in the form of unissued degrees even if it was its intent. The present Indictment therefore does not contain plain nor definite wording of facts.

Decisions in the 4th Circuit as well as decisions of other Circuits, with considerable uniformity, dismiss indictments which do not state the essential facts constituting the offense charged, United States versus Loayza, 4th Cir. 1997. Hence Dr. Frost requests the Grand Jury to maintain this uniformity between Circuit Courts and reverse the 6th Circuit's affirmation of Counts 17, 19 and 20.

Upholding the "Honest Services" Counts, Stretches the Standard to the Point of Being Overly Broad Unconstitutionally Vague and in Direct Conflict with the 6th Circuit's Own Opinion

The Government's Brief for The United States in Opposition, does not resolve the issue that based on the 6th Circuit Courts own citations Frost's conviction on Counts 17-20 in any other circuit would be overturned because he is not a public official. Nor does it provide substantive answers to the question of whether or not Frost owes a fiduciary duty to the University which is only vaguely answered by the Sixth Circuit Panel.

The appellate court concluded that a breach by a private fiduciary violates the mail fraud act and is subject to criminal prosecution. This ruling leads to the result that any professor who has the major responsibility for a student's degree which is subsequently deemed academically unacceptable by the University and/or its general council is subject to criminal litigation.

The 6th Circuit uses arguments such as the following to prove Frost has a fiduciary duty to the University:

> "Indeed, Berlinrut testified that he did not graduate from UTSI because Frost gave him a "no progress" for his dissertation research during his last quarter, and because he failed his comprehensive final examination, which

> Frost prepared by taking the unusual step of not telling Berlinrut beforehand that the exam would include an additional math problem.
>
> Accordingly, Frost and Turner owed a fiduciary duty to the University when determining whether a student would graduate if the University has a property right in a degree which it has not issued yet."
>
> ...
>
> "The University of Tennessee therefore has a property right in its unissued degrees, and Frost and Turner had a fiduciary duty to the University when exerting their considerable influence over whether the school would give a degree to a student."

The 6th Circuit's opinion creates potential criminal liability so broad that it renders any professor, who is supervising an academic degree, subject to criminal liability if he adds an extra question to an exam or grades the student's progress insufficient as interpreted by a court of law rather than by the academic community. Dr. Frost would ask this Court to rule the 6th Circuits interpretation of a professors fiduciary duty to the University as excessively broad and unconstitutionally vague and dismiss Counts 17-20 for these reasons.

Court Failed to Remand Back to the District Court All Counts under a Given Scheme for Which the Government Failed to Disclose *Brady* Material

The U.S. Government's Brief for The United States in Opposition does not respond to relevant issues raised by the defendant to this Court. The U.S. Government response brief, in most instances, simply restates the opinion of the Appellate Court.

Frost contends (Frost Pet. 22-25) that because of *Brady* violations, the court of appeals should remand for a hearing, Counts 21 through 24 as well as Counts 25 through 29, to determine whether he should receive a new trial on an alleged scheme to defraud the government through improper billings . The Government (Brief for The United States in Opposition 23) only restates the Court of Appeals rejection: "Dailey's testimony related only to the counts based upon the billing of bonuses as direct costs (Counts 25 through 29). Because the testimony was unrelated to the other billing counts

(Counts 21 through 24), which were based upon improper billing for travel and for work performed by an FWG employee, there was no "reasonable probability" that disclosure of the exculpatory evidence would have altered the outcome of the trial with respect to those counts."

It is simply impossible to conclude, however, that Dailey's testimony would not have a "reasonable probability" of influencing the jury's decision on Counts 21 through 24 as well as Counts 25 through 29. Chester Dailey was the Contract Administrating Officer on the biggest contract involved in the case. Before and during trail the defense was informed that Mr. Dailey would serve as an expert witness for the Government and testify in his opinion that the billing practices were deceptive. After trial the defense learned, however, that Mr. Dailey had been interviewed by Government agents and had, in fact, told them the exact opposite opinion (Frost Supplemental Motion for New Trial February 8, 1996). Comments from Mr. Dailey include: (1) that he came to know and interact with Walter Frost while he was overseeing the MDA contract between the Army and FWG; (2) that he had never expressed an opinion to anyone that FWG's bonuses were billed in a deceptive manner or were disguised in any manner; (3) that bonuses are allowable under the contract; (4) that small businesses like FWG often submit vouchers that they feel are proper according to their method of doing business, but which are not allowable under the Government regulations; (5) that such mistakes by small businesses are usually not fraudulent, but the result of accounting systems which are not as sophisticated as large companies; (6) that he knew of no intentional irregularity in the submissions of FWG; (7) that Walter Frost knew his agency would thoroughly audit the contract; and (8) that he knew of no fraudulent conduct on the part of FWG.

Exculpatory evidence, such as the above, indicating that Dr. Frost had no intent to deceive the government with regard to his billing on the bonuses is material to the billing on all counts. If the jurors agreed with the governments own contracts expert that the bonuses were not billed deceptively, it is very reasonable that they would conclude the few time sheet and expense account problems were honest billing mistakes as Dr. Frost had explained.

On November 25, a second motion for new trial to the District Court (not yet litigated) relating to *Brady* material in the form of a CID report was filed. The 1991 CID report expresses the undiluted opinion of the Department of Army's expert in the field of procurement fraud, Mr. William H. Kennedy, that there was insufficient probable cause to believe a criminal violation had been substantiated against FWG. their employees (Frost and Turner) or any U.S. Army employee (Faulkner) (see Frost Pet. 12).

With knowledge that the above exculpatory information was available, the defense at the time of trail could have called Mr. Dailey to testify as to the billing practices of FWG and called William H. Kennedy to testify as to the content of the CID report. It is impossible to believe that this favorable testimony from the major Contract Administrating Officer and the Department of Army's expert in the field of Procurement Fraud would not have a "reasonable probability" of influencing the jury's decision.

Testimony from such witnesses as these would definitely offset the false impression of deceptive billing procedures alleged in Counts 21 through 24 produced by the testimony of the Government's expert witness, Randy Fowler, who through his own admission (Transcript) is not a expert in contracting regulations (Frost Pet. 24).

Dailey's testimony, which the government intentionally or unintentionally concealed from the jury, could have supported the defense's own expert witness, Charles Bonuccelli (Transcript) testimony on complex government rules, i.e. the FAR (see Frost Pet. 24-25), relative to overhead, direct and indirect labor, travel reimbursement, executive bonuses etc.. This would have gone a long way toward clearing up misconceptions of FAR regulations which still linger in the government's brief today (Brief for The United States in Opposition 5) i.e.:

> **"Counts 21 and 22 charged Frost and Turner with billing the work of FWG employee Robert Smith not according to which contract he actually worked on, but according to which contract would enable Frost and Turner to request the most money."**

This is a total misconception of the billing procedure and not proven at trial

(see Bonuccelli, Transcript). Moreover, the implication that Frost and Turner somehow made money on this procedure is erroneous. The time sheets reflect salaries paid to employees (not money in the employer's pocket) and each salary paid is verified at audit and at tax time with canceled checks.

Also

> "while falsely labeling the vouchers as claims for direct labor—i.e., work performed to fulfill the requirements of the contracts—thereby enabling him to receive additional payments for fringe and overhead costs."

Overhead is not profit, it is the cost operations. The cavaliering and prejudicial definition of overhead as "twofers" promulgated by Fowler at trail (Frost Pet. 25) is wrong. All overhead charges to a government contract must be verified by original receipts or invoices during audit.

While Dr. Frost concurs with the 6th Circuit Court's *Brady* analysis, he respectfully suggests that there is a reasonable probability that the suppressed exculpatory information affected all of the counts listed under the "billing" scheme. As noted, there was only one overall scheme listed in all these counts. The only question was whether Dr. Frost intended to deceive the government. Certainly, exculpatory evidence indicating that Dr. Frost had no intent to deceive the government with regard to his billing on the bonuses was material to his defense on all of the billing counts.

Since there is only one scheme alleged to support all the mailings, evidence which may have materially affected the verdict on any one of the mailings alleged to further the scheme must necessarily affect all of the mailings. As the government points out, in order to convict, the jury only needs to find that the mailing furthered the scheme in some respect (Transcript). Thus, it is impossible for the appellate court to know whether the jury strictly limited its verdict on Counts 21 through 24 to evidence of improprieties regarding time sheets and expense accounts or whether, as is more likely, the jury considered the bonus allegations in support of the overall scheme and all the mailings. Because the scheme is not divisible, the Court should remand Counts 21 through 24, along with Counts 25 through 29.

Remanding the entire scheme would certainly not place a burden on the district court since the allegations of improper time sheets and expense accounts played only a minor role in the overall trial. If the case is to be remanded, it should be remanded for consideration of the materiality of the *Brady* violation on the overall scheme as charged in Counts 21 through 29, which charged the single "billing" scheme. Frost seeks this Courts review and request that the *Brady* violations in this particular case go toward all billing counts and they should all be remanded back to the district court for a new trial.

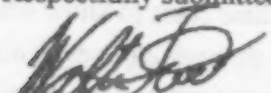
The U.S. Government's Brief for The United States in Opposition address none of the issues raised and reiterated above. Dr. Frost therefore still questions whether the Sixth Circuit interpretation of the materiality of *Brady* violation is sufficient broad to fully assess its impact on his jury conviction on Counts 21-24. The internal disagreement within the Sixth Circuit pertain to *Brady* violations by the same prosecutor (United States v. Schledwitz, 86 F.3d 73, 75 (6th Cir.)) (Frost Pet. 22) still exists and Dr. Frost respectfully ask The Supreme Courts to use its supervisory power to remand all billing counts back to the district court for a new trial.

Conclusion

The petitioner respectfully requests The Supreme Court of the United States to review the original and revisited issues of law and dismiss all charges against Dr. Frost for lack of evidence to prove an essential element of mail fraud i.e. devising or intending to devise a scheme to defraud.

The petition for writ of certiorari should be granted.

Respectfully submitted,



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